PUBLIC PROSECUTOR

v.

SIHABDUIN HJ. SALLEH & ANOR.

FEDERAL COURT, KUALA LUMPUR
SUFFIAN LP
RAJA AZLAN SHAH CJ (MALAYA)
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN FJ
SYED OTHMAN FJ
[CRIMINAL APPEAL NO. 67 OF 1977]
27 AUGUST 1980

CRIMINAL PROCEDURE: *Onus of proof - Whether in a security case governed by reg. 13, Essential (Security Cases) Regulations 1975 the Court is obliged in every case to call on the accused to enter on his defence.*

STATUTORY INTERPRETATION: *(i) Regulation 13, Essential (Security Cases) Regulations 1975 (ii) Court's duty in construing statute law (iii)Relevance of reg. 3(1), 14, 15, 17 Essential (Security Cases) Regulations 1975 (iv) Section 180, Criminal Procedure Code.*

The first accused was charged with having under his control in a security area a firearm contrary to s. 57(1), Internal Security Act, 1960, while the second accused was charged with being found in the company of the first accused contrary to s. 58(2), Internal Security Act, 1960. The trial Judge acquitted and discharged both the accused after the prosecution had closed its case without calling on the accused to enter on their defence on the ground that the prosecution had not made out a *prima facie* case. The prosecution appealed against the acquittal contending that the learned trial Judge had erred in not calling on the accused to enter on their defence, as he is obliged to do in a security case in view of reg. 13, Essential (Security Cases) Regulations 1975. The appeal was dismissed.

Held:

[1] In a security case, the court is not obliged to call the accused to enter on his defence at the end of the prosecution case, unless a *prima facie* case has been proved against the accused. The cardinal principle of our system of criminal justice is that an accused person is presumed to be innocent and the onus is on the State to prove that he is guilty.

[2] It is for the Court to hear evidence for the prosecution first, and at the end of the prosecution case, the Court to consider whether or not the prosecution has made out a case against the accused which, if unrebutted, would warrant his conviction.

[3] If the Court is of the opinion that a *prima facie* case has been made against the accused, then only should the Court call for the defence and not otherwise.

Regulation 13 provides that "when the case for the prosecution is closed, the Court shall call on the accused to enter on his defence."

Regulations 14 and 15 clearly provide that if defence is called, the accused is not obliged to give evidence, he may remain silent and not call any witnesses. Regulation 17 does not therefore mean that in every case the accused must be called to enter on his defence. Therefore the word "defence" in reg. 13 can only be construed to mean "defence, if any".

[Appeal dismissed in so far as the point of law was concerned]

Cases referred to:
Johnson Tan Han Seng v. PP [1977] 2 MLJ 66
Duport Steels Ltd. v. Sirs [1980] 1 All ER 529

Legislation referred to:
Criminal Procedure Code, s. 180
Essential (Security Cases) Regulations 1975, regs. 13, 17
Internal Security Act 1960, ss. 57(1), 58(2)

For the appellants - Shaikh Daud bin Haji Mohamad Ismail, DPP
For the respondents - K. Pasupathy (Victor Isaacs with him); Tengku Seri Laksamana & Isaacs

JUDGMENT

Suffian LP:

The issue here is whether in a security case tried in accordance with the Internal (Security Cases) Regulations 1975, ("the regulations"), when the prosecution has closed its case, the Court is obliged to call on the accused to enter on his defence, even if the prosecution has not made out against him a case which, if unrebutted, would warrant his conviction.

This point was first argued before three of us, on 3 July 1979, when we reserved judgment. In the course of considering our draft judgment, we decided that it would be desirable to have a point of law of such importance as this re-argued before five Judges; and accordingly it was re-argued on 23 June 1980, in the presence of two additional members of the Court, namely our brothers Raja Azlan Shah CJ (Malaya), and Lee Hun Hoe CJ (Borneo).

At first this appeal was argued on behalf of the accused by Tengku Suleiman. The date of re-argument was fixed to enable him, who was then away overseas, to appear again before us. But as it happened, at the second hearing the accused were represented by Mr. Pasupathy and Mr. Victor Isaacs.

Tengku Suleiman, later Mr. Pasupathy, has been instructed only by the second accused. The Court has not been able to serve the appeal record on the first accused; and they were assigned to represent him and to argue on his behalf despite the fact that neither had received instructions, but the appeal to be limited at this stage only to consideration of the issue stated at the beginning of this judgment.

At the first hearing the Public Prosecutor was represented by Encik Sharkawi and at the second by Shaikh Daud.

The first accused was charged with having under his control in a security area a firearm contrary to s. 57(1) of the Internal Security Act 1960, and the second accused with being found in his company contrary to s. 58(2) of the same Act.

After the prosecution had closed its case, the learned trial Judge acquitted and discharged both accused, on the ground that the prosecution had not proved a *prima facie* case.

The Public Prosecutor contends that, this being a security case tried in accordance with the regulations, the learned trial Judge erred in not calling on the accused to enter on their defence, in view of reg. 13 which provides:

> When the case for the prosecution is closed, the Court shall call on the accused to enter on his defence.

It will be observed that reg. 13 is diametrically opposed to s. 180 of the Criminal Procedure Code which governs ordinary trials and which provides that:

> the Court, if it finds (at the end of the prosecution case) that no case against the accused has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.

If the accused had been tried in accordance with the Code, clearly the learned Judge was right in acting as he did. Was he right in acting as he did in this case, tried not under the Code but under the regulations?

What if in a security case all the prosecution did was to produce the accused, have the charge against him read and explained and then produce only formal evidence relating to exhibits? Should the Court then have to call on the accused to enter on his defence? Shaikh Daud's answer was that the Public Prosecutor would use reg. 13 responsibly and not in an absurd way.

What if the prosecution relied on a cautioned statement made by the accused as the only evidence against him and the trial Judge found that it had not been made voluntarily and declined to admit it in evidence? Would the Court be obliged to call on the accused to enter on his defence? Shaikh Daud submitted yes, for (he said) the accused's right to remain silent had not been taken away by the regulations, and if he remained silent and called no evidence, he would be entitled to be acquitted and discharged. But what if he gave evidence or called evidence and he or his witnesses in cross-examination made admissions which served to fill in gaps in or otherwise supplement the prosecution case? It would appear from reg. 17 (reproduced below), which requires the Court to decide "upon hearing and considering the evidence of both the prosecution and the defence as a whole", that the Court would then be entitled to find him guilty, if it thought that on the whole of the evidence the prosecution had proved its case and that the defence had not thrown any doubt on it.

Shaikh Daud was able to cite only one authority in support of his contention that come what may, at the end of the prosecution case, the Court must in a security case call on the accused to enter on his defence. It was *Johnson Tan Han Seng v. PP* [1977] 2 MLJ 66. There I said at p. 73:

> The learned Judge acquitted the accused at the end of the prosecution case without calling on him for his defence. With respect here too I think that he was in error, because what he did was flatly opposed to regs. 13 and 17...

But as was pointed out to Shaikh Daud during arguments, the point in issue here did not arise there in the same acute way as it has done here, and so was not fully argued.

In answering the question before us, regs. 3(1), 14, 15 and 17 are also relevant and they provide as follows:

> 3(1) These Regulations shall have effect with respect to security cases notwithstanding anything to the contrary contained in any written law; but, except in so far as the same are varied by these Regulations, the ordinary practice and procedure, when appropriate, shall apply to security cases.
>
> 14(1) The accused or his Counsel may, then open his case, stating the facts or law on which he intends to reply and making such comments as he thinks necessary on the evidence for the prosecution; he may then examine his witness (if any) and after their cross-examination and re-examination (if any) may sum up his case.

(2) Where the accused elects to give evidence on oath or make a statement from the dock, his evidence or statement shall be taken before that of other witnesses for the defence, and, if he gives evidence on oath, he may be cross-examined by the prosecution or by any other accused, and the Court may also put any question to him.

15. In all cases the prosecution shall have the right to reply on the whole case, whether the accused or his Counsel adduces evidence or not.

17. The Court shall decide on the guilt or innocence of the accused only, at the conclusion of the case for the defence, and it shall so decide upon hearing and considering the evidence of both the prosecution and the defence as a whole, having regard to the justice of the case, without regard for the technicalities of the rules of evidence or procedure, or for any defect concerning the charge.

We have been able to find, apart from *Johnson Tan* [1977] 2 MLJ 66 two cases in which the effect of these regulations, in so far as they are material to the issue before us, has been considered.

First, there is a decision of Harun J on 26 October 1976, in *PP v. Chea Soon Hoong alias Foo Soh Loh,* Federal Territory Criminal Trial No. 23 of 1976 unreported, in which he appears to have said that at the end of the prosecution case, the Court must call on the accused to enter on his defence, regardless. He said:

There are two main ingredients to prove a charge under s. 57 of the Internal Security Act, *viz*:

(i) the offence was committed in a security area without lawful excuse; and

(ii) the accused had under his control the firearm or ammunition without lawful authority.

By virtue of reg. 17 of the Essential (Security Cases) Regulations, I must accept the evidence of the prosecution as to the facts of the case at this stage. This covers the second ingredient.

The second case is a decision of Azmi J on 28 January 1977, in *PP v. Yap Seng Keat* Federal Territory Criminal Trial No. 49 of 1976 also unreported, in which he also appears to have said the same thing as Harun J. He said:

The main encroachment into the ordinary practice of criminal law made by these Regulations is that, it is not necessary for the prosecution to prove their case beyond reasonable doubt at the close of their case, and it seems to me that the principle that the defence should not be called merely to clear any doubt in the prosecution case or to supplement any deficiency in their case does not apply.

In construing the regulations in order to answer the question posed in this appeal, the following considerations apply.

First, it is a cardinal principle of our system of criminal justice that an accused person is presumed to be innocent, that the onus is on the State to prove beyond reasonable doubt that he is guilty, and that the practice for as long as we can remember is for the Court to hear the evidence for the prosecution first, and that at the end of the prosecution case the Court has to consider whether or not the prosecution has made out a case against the accused which, if unrebutted, would warrant his conviction, and that the Court should call on the accused to enter on his defence if and only if the Court is of the opinion that the prosecution has made out such a *prima facie* case against the accused, and not otherwise.

Secondly, the relevant law-maker has power to amend the law at any time to change this principle so as to render it unnecessary for the prosecution to prove a *prima facie* case at the end of its case, so that thereafter the Court is obliged to call on the accused to enter on his defence, even if no *prima facie* case has been proved against him.

Thirdly, if the law-maker so amends the law, to paraphrase the words of Lord Diplock at p. 541 in *Duport Steels Ltd. v. Sirs* [1980] 1 All ER 529, the role of the judiciary is confined to ascertaining from the words that the law-maker has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the words is plain and unambiguous it is not for Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral or to paraphrase the words of Lord Scarman at p. 551 in the same case, in the field of statute law the Judge must be obedient to the will of the law-maker as expressed in its enactments, the Judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the enactment. Even if the result be unjust but inevitable, he must not deny the statute; unpalatable statute law may not be disregarded or rejected, simply because it is unpalatable; the Judge's duty is to interpret and apply it.

Fourthly, in criminal law because of the cardinal principle that an accused person is presumed innocent and that it is the duty of the prosecution to prove his guilt, any ambiguity in a statute must be resolved in favour of the liberty of the subject.

Applying the above considerations, we are of the opinion that in a security case at the end of the prosecution the Court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a *prima facie* case against him. In our judgment, reg. 13 is not clear. It does not say that at the end of the prosecution case the Court must call on the accused to enter on his defence in any case. All it says is that it must call on the accused to enter on his defence. In our judgment, the word "defence" must be read to mean "defence if any", so that there is no duty on the Court to call on him to enter on his defence if there is nothing for him to defend, which is the case if no *prima facie* case has been proved against him by the end of the prosecution case. Our conclusion would have been different if the regulation had ended with the words "notwithstanding that no case has been made out against him which, if unrebutted, would have warranted his conviction." From regs. 14 and 15 it is clear that if called on to enter on his defence the accused is not obliged to give evidence and that he may therefore remain totally silent and not call witnesses. The words in reg. 17 requiring the Court to consider the evidence both of the prosecution **and the defence** before determining the guilt or innocence of the accused do not therefore mean that the accused must in every case be called upon to enter on his defence.

For the above reasons we would dismiss this appeal in so far as the point of law is concerned.

Wan Suleiman FJ (dissenting):

The issue here is whether in a security case trial in accordance with the Essential (Security Cases) Regulations 1975, when the prosecution has closed its case, the Court is obliged to call on the accused to enter on his defence, even if the prosecution has not made out against him a case, which, if unrebutted, would warrant his conviction.

Having given this matter considerable thought, I yet find myself unable to change my view that we were right in *Johnson Tan's Han Seng v. PP* [1977] 2 MLJ 66 where at p. 73 the learned Lord President held that the learned trial Judge was wrong in acquitting the accused at the end of the prosecution case without calling on him to make his defence "because what he did is flatly opposed to regs. 13 and 17 ..."

Since the trial was in the High Court a comparison with Chapter XX, which pertains to trials before the High Court without Assessors under the Criminal Procedure Code will make it clear that the law makers in setting out the modified procedure for security trials were well aware of the existing criminal procedure and has every intention of effecting a substantial change thereto.

Beginning with s. 178 of the Criminal Procedure Code, I note that reg. 11 of the regulations, which bears the same marginal title i.e. "Commencement of trial" is identical. Section 179 and reg. 12, which again bear identical marginal titles, make no alteration in procedure.

Only when we come to s. 180, and compare it with the parallel reg. 13 do we find a significant difference. Section 180 reads:

> When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or if it does not so find, shall call on the accused to enter on his defence.

Compare these words to those of reg. 13 which reads:

> When the case for the prosecution is closed, the Court shall call on the accused to enter on his defence.

Why, one may ask were the material words "if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an acquittal or if it does not so find" omitted?

Azmi J in *PP v. Yap Seng Keat* Federal Territory Criminal Trial No. 49 of 1976 (unreported) has noted one major reason, a reason if I may say with deepest respect, of great significance, for his Lordship said:

> The main encroachment into the ordinary practice of criminal law made by these Regulations is that, it is not necessary for the prosecution to prove their case beyond reasonable doubt at the close of their case, and it seems to me that the principle that the defence should not be called merely to clear any doubt in the prosecution case or to supplement any deficiency in their case does not apply.

Proceeding with our comparison, ss. 180 and 182 are substantially the same as regs. 14 and 15 respectively.

It is true that the latter two regulations make it clear that if called on to enter his defence an accused person retains the right to remain silent himself and need not call witnesses in his defence.

But in my view, the very presence of reg. 17 reinforces the argument that the law makers had changes in the existing law in mind. If reg. 13 leaves any doubt as to the changes intended the choice of words in reg. 17 should serve only to dispel such doubts.

> "The Court shall decide on the guilt or innocence of the accused **only** at the conclusion of the case for the **defence**" the regulation proceeds to say, and moreover "it shall so decide upon hearing and considering the evidence of **both the prosecution and the defence as a whole** ..." (The emphasis is mine).

Can there be more manifest indication of the intention of Parliament to modify, in favour of the prosecution, the pre-existing state of criminal procedure in cases coming within the regulations?

The words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd. v. Sirs* [1980] 1 All ER 529, seem to me to be particularly apt, for:

> the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.

The advantage to the prosecution can only be but slight and that should include whatever comfort the knowledge that the defence would be called in any case has to offer to the Prosecutor where things begin to go wrong with the prosecution case, but the presumption of the innocence of an accused person remains unchanged.

It would not be out of place to suggest that Judges should be urged to state at the close of prosecution case whether in their finding a *prima facie* case has or has not been made out by the prosecution, so that the accused person would know when it would be to his advantage to remain silent.

I would, with respect, allow the appeal, set aside the order of acquittal and order the accused to make their defence.

Also found at [1981] CLJ 39